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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
Democratic Senatorial Campaign Committee,) MUR 5183
and J.B. Poersch, in his official)
capacity as treasurer)
Democratic Congressional Campaign Committee)
and John Lapp, in his official)
capacity as treasurer)

SENSITIVE

GENERAL COUNSEL'S REPORT #3

I. ACTIONS RECOMMENDED

Take no further action against the Democratic Senatorial Campaign Committee, ("DSCC") and J.B. Poersch, in his official capacity as treasurer, and the Democratic Congressional Campaign Committee ("DCCC") and John Lapp, in his official capacity as treasurer, and close the file.

II. BACKGROUND

This matter involves corporate advances made by the Rainbow/PUSH Coalition, Inc. and Citizenship Education Fund, Inc., two corporations controlled by Reverend Jesse L. Jackson, Sr. ("Jackson Respondents"), to fund a 2000 election cycle speaking tour on behalf of the Democratic National Committee ("DNC"). See First General Counsel's Report, dated February 27, 2004 ("First GCR"). Following an investigation, the Jackson Respondents and the DNC signed conciliation agreements admitting that the tour constituted coordinated, partisan get-out-the-vote and voter registration ("GOTV/VR") activity, and that its costs, which totaled \$450,000 (\$250,000 of which was reimbursed via an allocated federal/nonfederal payment from the DNC) resulted in a corporate advance in violation of 2 U.S.C. § 441b. The Jackson Respondents and the DNC each paid a civil penalty of \$100,000 and agreed to cease and desist from future violations. See General Counsel's Report #2, dated January 26, 2005.

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At the same time, the Commission accepted conciliation agreements from the Jackson Respondents and the DNC, the Commission found reason to believe ("RTB") that the DSCC and DCCC had violated 2 U.S.C. §§ 441a(f) and 441b and 11 C.F.R. § 102.5(a)(1)(i) and 106.5(c) & (g)(1)(i), for their apparent role in reimbursing the Jackson Respondents for a portion of the expenses associated with the partisan GOTV/VR tour. Reason to believe was based on information that appeared to show that, rather than using an allocated mix of federal and nonfederal funds to reimburse the Jackson Respondents for what both the Jackson Respondents and the DNC acknowledged to be the balance of the \$450,000 in travel expenses, the DSCC and DCCC each used \$100,000 in nonfederal funds.

Upon reevaluating this matter, we have concluded, based on the unique set of circumstances, that it does not warrant further action: (1) the primary Respondents have each paid a substantial civil penalty and agreed to cease and desist from future violations; (2) given that Democratic Party national committees already have paid a \$100,000 penalty and the national party committees are no longer permitted to raise and spend nonfederal funds, additional penalties will serve a limited deterrent effect; (3) the conduct at issue is over four years old, and the year-long investigation of the DNC and the Jackson Respondents produced limited evidence that the DSCC and DCCC knew about the DNC's arrangement with the Jackson Respondents as to their contributions; and (4) newly-submitted affidavits cast doubt on whether the DSCC and DCCC knew the purposes of the contributions, challenging information upon which RTB rested. Moreover, counsel for the DSCC and DCCC raise concerns and objections regarding alleged procedural errors in RTB not having been found prior to further inquiries as to their role in this matter. Although counsel have not argued any actual prejudice to their clients, their objections may prevent conciliation and present a potentially distracting side issue, which does not seem

1 worth contesting given the various factors favoring dismissal. Accordingly, we recommend that
2 the Commission take no further action against the DSCC and DCCC; and close the file.

3 **III. FINDINGS AGAINST DSCC AND DCCC**

4 **A. Investigation Leading to RTB Findings**

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6 At the time the Commission found reason to believe the Jackson respondents and the
7 DNC violated the Act, this Office had no information regarding any involvement by the DSCC
8 or DCCC in the GOTV/VR tour, and the two party committees had not been named in the
9 complaint. Thus, in the initial phases of the investigation, the known costs of the tour were
10 \$250,000, which was the amount the DNC had disbursed to Jackson. The investigation focused
11 on obtaining evidence as to whether the tour was coordinated and partisan, and confirming the
12 tour's costs.¹

13 An interview with Rainbow/PUSH's former Chief Financial Officer, Billy Owens,
14 conducted on July 16, 2004 provided us with the first suggestion that the DSCC and DCCC
15 furnished funding to the campaign. Owens testified that the DNC's \$250,000 payment was part
16 of a larger \$450,000 commitment made by the DNC on behalf of the Democratic Party and that
17 he understood that the DNC had arranged for the DSCC and DCCC to provide \$100,000
18 each to the Jackson Respondents. Following Owens' testimony, we searched the public filings
19 of the DSCC and DCCC, which indicated that the DSCC paid \$40,000 to Citizenship Education
20 Fund on October 11, 2000 and an additional \$60,000 on October 26, 2000, while the DCCC paid

¹ The complaint, citing to certain news reports, speculated that the cost of the tour may have totaled \$450,000, and may have been funded by "Democratic Party committees." Thus, the investigation did not exclude the possibility that additional committees may have been involved, and evidence of other reimbursements was requested from the Jackson respondents. See First General Counsel's Report at 17.

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1 \$100,000 to Rainbow/PUSH Coalition on November 8, 2000. Eventually, the DSCC and DCCC
2 confirmed that the payments occurred.²

3 While continuing to seek evidence on the primary issues set forth in their conciliation
4 agreements, we also sought from the DNC and the Jackson Respondents confirmation of Owens'
5 testimony concerning a possible role of the DSCC and DCCC. The Interrogatories filed by the
6 Jackson Respondents on September 30, 2004, which were based on Reverend Jackson's
7 recollections about the tour, indicated that the "Democratic Party" had reached an agreement to
8 fund the speaking tour and that part of the total payments came from the DSCC and DCCC; but
9 no additional specifics were offered. No DNC witnesses could confirm the involvement of the
10 DSCC and DCCC, although the DNC ultimately took the position that it could not dispute
11 Owens' testimony.³

12 In January 2005, we recommended that the Commission find reason to believe that the
13 DSCC and DCCC violated statutory and regulatory provisions related to their failure to use
14 allocated funds for reimbursements to the Jackson Respondents based on (1) DNC and Jackson
15 Respondent admissions, in the Conciliation Agreements, that the Jackson tour was a partisan,
16

² In order to make the confirmation, we sent letters to the treasurers for the DSCC and DCCC, asking them to confirm the payments, disclose whether any additional payments might have been made (for instance from federal accounts), and explain the circumstances surrounding the payments. In response, counsel for the committees requested an extension to provide the requested documents until November 12, 2004 (after the upcoming general election), which we granted. However, on the evening of November 11, 2004, counsel left a voicemail advising that his clients in fact would not comply with the requests. Subpoenas were issued on November 17, 2004. The cover letter accompanying the subpoena, and an earlier letter from us memorializing discussions about potential cooperation, stated that the DSCC and DCCC were witnesses, not respondents, in this MUR. The two committees filed motions to quash their subpoenas, but eventually agreed, following negotiations, to produce at least preliminary information verifying that the \$100,000 payments occurred and that no additional payments from federal accounts were made.

³ The DNC produced its Chief Financial Officer, Brad Marshall, to provide testimony on the DNC's knowledge of the Jackson tour in response to a subpoena issued to the DNC requiring it to produce a witness in a manner akin to Federal Rule of Civil Procedure 30(b)(6). On September 30, 2004, Marshall testified that he had no information concerning a DSCC and DCCC role in the GOTV/VR tour.

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1 coordinated GOTV/VR effort conducted on behalf of the Democratic Party, (2) the evidence
2 suggesting that the DSCC and DCCC had funded the effort through their payments exclusively
3 from non-federal accounts, and (3) Owens' testimony that the DSCC and DCCC were fulfilling a
4 commitment entered into by the DNC. The Commission approved the recommendations and on
5 February 4, 2005, the DSCC and DCCC were notified of the factual and legal basis on which the
6 Commission had found RTB they violated the Act.⁴

7 **B. Responses to the RTB Findings**

8 The DSCC and DCCC submitted separate responses to the RTB findings under one cover
9 from their joint counsel. Attachment 1. The responses, which are in most respects identical,
10 criticize the quality of the information upon which the findings were made. They also note that
11 the present legal issue is "purely historical" because under BCRA, party committees can no
12 longer use nonfederal funds to make donations to nonprofit organizations.

13 Respondents argue that the factual and legal analyses supporting RTB lack information that
14 the DSCC or DCCC knew how their contributions to the Jackson respondents would be used,
15 that any elections were targeted for support, or that any specific communication occurred
16 between the DSCC and DCCC and the Jackson respondents or the DNC. They claim that this
17 lack of "real information" exists "despite access to DNC counsel and witnesses throughout the
18 MUR and conciliation process."

19 Further, the respondents claim their contributions to the Jackson Respondents were made
20 for charitable purposes, pointing to the Citizenship Education Fund's 501c(3) status, DSCC

⁴ In the interim period, the treasurers for both parties changed; this Report uses the names of the new treasurers.

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1 cover letters memorializing wire transfers which assert the charitable intent of the contributions,⁵
2 and the DCCC's tax treatment of its contribution to Rainbow/PUSH. Affidavits from officers
3 from the DSCC and DCCC state that all available information suggests the donations to the
4 Jackson Respondents were made for nonpartisan purposes. Counsel also attempts to distinguish
5 relevant legal precedent from the present facts by noting that the allocation fact patterns in other
6 MURs have involved committees that "funded and directed activities" and targeted races which
7 the party committees sought to influence. In this matter, they assert that there is no evidence that
8 the DSCC and DCCC directed any activities or that any specific races were targeted.

9 In addition to disputing the RTB findings on substantive grounds, the respondents also
10 make procedural arguments. Specifically, they argue that RTB arose from "irregular – indeed
11 arbitrary – circumstances" because the findings rely on evidence obtained while the DSCC and
12 DCCC were being treated as witnesses, and because the respondents were subpoenaed for
13 information as witnesses, not respondents.⁶ Some of these concerns were also discussed in a
14 meeting between Respondents' counsel and the Office of General Counsel where respondents
15 claimed that correspondence denominating the DSCC and DCCC as witnesses, not respondents,
16 misled them into cooperating with the investigation, denying them the opportunity to pursue

⁵ The cover letters were signed by the DSCC's Executive Director Jamie Fox and state that the "donation is made for charitable purposes and may not be used in connection with any partisan political activities." See General Counsel's Report #2 at attachment 3.

⁶ Counsel does not challenge the fact that the Commission subpoena sought information related to the pending investigation of the DNC and the Jackson Respondents. The information requested from the DSCC and DCCC was legitimately sought and was clearly relevant to the primary violations investigated by the Commission. The information was needed to confirm that payments were in fact made by the DSCC and DCCC to the Jackson respondents in the fall of 2000 and to determine whether there were any other amounts paid by the committees from other accounts. Moreover, this Office was required to contact third-party witnesses to obtain the confirmation of the payments due to certain recordkeeping lapses by the Jackson Respondents (they had no record of ever being paid by the DSCC and DCCC).

Further, if in response to our questions the DSCC and DCCC had produced evidence of disbursements from allocated accounts, the matter would have been resolved immediately.

1 other courses of action that they assert would have been available had they received earlier
2 notice that there was reason to believe they violated the Act.

3 **C. Closing the File**

4 This Office recommends that the Commission take no further action against the
5 remaining respondents, the DSCC and DCCC, and close the file in this matter. The Commission
6 has successfully resolved the core allegations of this MUR, establishing that the Jackson
7 Respondents had made a substantial corporate advance for a partisan GOTV/VR program.
8 Based on the results of the investigation, the DNC and Jackson Respondents each paid six-figure
9 civil penalties, admitted to serious violations of the Act, and agreed to cease and desist from
10 future violations. Given the substantial relief obtained from the Democratic Party, through the
11 DNC, there is little or no need for additional deterrence. Furthermore, under BCRA, party
12 committees such as the DSCC and DCCC are no longer able to raise and maintain funds outside
13 the strictures of FECA, and therefore, they no longer have non-federal accounts from which to
14 fund events such as the Jackson tour.

15 The unresolved conduct is over four years old, and although there is a potentially useful
16 evidentiary record available in the matter, a question remains as to the DSCC's and DCCC's
17 knowledge of the purpose of these payments. Little concrete information was obtained from the
18 witnesses who have been interviewed, and with the continued passage of time, the likelihood of
19 obtaining dispositive testimony from anyone with actual knowledge of the events diminishes.
20 Balanced against the incomplete record, the respondents have submitted affidavits from officers

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who claim that the intent of the contributions was nonpartisan support of charitable organizations.

Adjoining these considerations are the alleged procedural issues which respondents may well use to impede resolution of this matter. In hindsight, there are legitimate arguments as to whether the better course may have been to find reason to believe that the DSCC and DCCC violated the Act and so notify them before serving them with subpoenas for documents. On the other hand, the subpoenas sought evidence directly relevant to the pending case related to the DNC and the Jackson Respondents, while the evidence potentially implicating the DSCC and DCCC did not take shape until some time in the summer or early fall. Taken together with the other circumstances described above, a skirmish over this procedural issue seems a poor use of resources at this time.

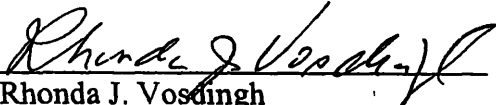
Based on these factors, the Office of General Counsel concludes that enforcement resources are better devoted to other matters and recommends that the Commission take no further action against the DSCC and DCCC and close the file on the MUR.


IV. RECOMMENDATIONS

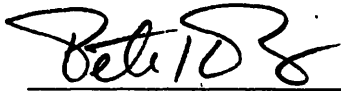
1. Take no further action against the Democratic Senatorial Campaign Committee, and J.B. Poersch, in his official capacity as treasurer.
2. Take no further action against the Democratic Congressional Campaign Committee, and John Lapp, in his official capacity as treasurer.
3. Approve the appropriate letters.
4. Close the file.

Date


Lawrence H. Norton
General Counsel


Rhonda J. Vosdingh
Associate General Counsel


Mark D. Shonkwiler
Assistant General Counsel


Peter G. Blumberg
Attorney

Attachment

Letter from Brian G. Svoboda, dated April 1, 2005 (with enclosures)

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